

1
2
3
4
5
6
7 **UNITED STATES DISTRICT COURT**
8 **DISTRICT OF NEVADA**
9

10 WILLIAM CARNS,

11 Plaintiff,

12 v.

13 FEDERAL NATIONAL MORTGAGE
14 ASSOCIATION, et al.,

15 Defendants.

Case No. 2:10-CV-00739-KJD-GWF

ORDER

16
17 Currently before the Court is Defendants' Motion to Dismiss (#6). Plaintiff filed a Response
18 in opposition (#9), to which Defendants filed a Reply (#13). Additionally before the Court is
19 Plaintiff's Motion for Remand (#10). Defendants filed a Response in opposition (#12). No Reply
20 was filed. The Court has considered both Motions, and for the reasons stated herein, grants
21 Defendants' Motion to Dismiss.

I. Background

22 Pro se Plaintiff, William Carns, filed his Complaint in State Court on April 15, 2010, alleging
23 fraudulent conveyance, and seeking a preliminary injunction to void the foreclosure sale of real
24 property located at 4720 Paradiso Place, Pahrump, NV 89061 ("subject property"). (#1-1.)
25
26

1 On or about January 18, 2007, Plaintiff purchased the subject property using Aurora Loan
 2 Service as the original servicer of the loan, in the principal amount of \$330,576.00. Plaintiff alleges
 3 that he received a notice of request to determine occupancy status of his home on or about July 6,
 4 2009, from Greenspan Brokerage of Pahrump, NV, after which time he learned that the subject
 5 property had been sold at a foreclosure auction on June 29, 2009.

6 Plaintiff's Complaint is based upon the allegation that prior to receipt of the request to
 7 determine occupancy status, he was "never made aware of any foreclosure actions" upon the subject
 8 property, as required under N.R.S. 107.080. (#1-1 at 2.)

9 **II. Standard of Law for Motion to Dismiss**

10 Pursuant to Fed. R. Civ. P. 12(b)(6), a court may dismiss a Plaintiff's complaint for "failure
 11 to state a claim upon which relief can be granted." A properly pled complaint must provide "a short
 12 and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P.
 13 8(a)(2); Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007). While Rule 8 does not require
 14 detailed factual allegations, it demands more than "labels and conclusions" or a "formulaic recitation
 15 of the elements of a cause of action." Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (citing Papasan
 16 v. Allain, 478 U.S. 265, 286 (1986)). "Factual allegations must be enough to rise above the
 17 speculative level." Twombly, 550 U.S. at 555. Thus, to survive a motion to dismiss, a complaint
 18 must contain sufficient factual matter to "state a claim to relief that is plausible on its face." Iqbal,
 19 129 S. Ct. at 1949 (internal citation omitted).

20 In Iqbal, the Supreme Court recently clarified the two-step approach district courts are to
 21 apply when considering motions to dismiss. First, the Court must accept as true all well-pled factual
 22 allegations in the complaint; however, legal conclusions are not entitled to the assumption of truth.
 23 Id. at 1950. Mere recitals of the elements of a cause of action, supported only by conclusory
 24 statements, do not suffice. Id. at 1949. Second, the Court must consider whether the factual
 25 allegations in the complaint allege a plausible claim for relief. Id. at 1950. A claim is facially
 26 plausible when the Plaintiff's complaint alleges facts that allow the court to draw a reasonable

1 inference that the defendant is liable for the alleged misconduct. Id. at 1949. Where the complaint
 2 does not permit the court to infer more than the mere possibility of misconduct, the complaint has
 3 “alleged—but not shown—that the pleader is entitled to relief.” Id. (internal quotation marks
 4 omitted). When the claims in a complaint have not crossed the line from conceivable to plausible,
 5 Plaintiff’s complaint must be dismissed. Twombly, 550 U.S. at 570.

6 **III. Discussion**

7 The procedure for conducting a trustee’s foreclosure sale in Nevada is set forth in NRS
 8 107.080 et seq. The foreclosure process is commenced by the recording of a notice of default and
 9 election to sell by the trustee. NRS 107.080(3). After the notice of default is recorded, the grantor
 10 has 35 days or, in the case of owner-occupied housing, up to 5 days before the foreclosure sale, in
 11 which to cure the deficiency in payment. Three months after recording the notice of default, a
 12 foreclosure sale may be conducted. NRS 107.080(2)(d). However, the trustee must first give notice
 13 of the time and place of the sale. NRS 107.080(4). At the appointed time and place, a sale is
 14 conducted, monies are bid, and a trustee’s deed is issued. Foreclosure procedures must be followed
 15 or the sale will be invalid. See Rose v. First Fed. Sav. and Loan, 777 P.2d 1318 (1989) (trustee’s
 16 sale invalid where notice requirements not satisfied). Section 107.080 provides that the “power of
 17 sale” is conferred upon the “trustee.” Section 107.080(2)(c) expressly states that the trustee can
 18 execute its power of sale once “[t]he beneficiary, the successor in interest of the beneficiary or the
 19 trustee first executes and causes to be recorded in the office of the recorder of the county wherein the
 20 trust property, or some part thereof, is situated a notice of the breach and of his election to sell or
 21 cause to be sold the property to satisfy the obligation.

22 Here, a Corporate Assignment of the Deed of Trust for the subject property was recorded in
 23 favor of FMNA on July 7, 2009.¹ (#6 Ex. 1.) A non-judicial foreclosure of the subject real property

24
 25 ¹Defendants seek that the Court take judicial notice of the attached documents. The Court, through judicial
 26 notice, acknowledges Plaintiff’s Exhibits of public records held by the Nye County Assessor’s Office under Fed. R. Evid.
 201(b). Fed. R. Evid 201(b) allows the court to take judicial notice of facts that are “capable of accurate and ready
 determination by resort to sources whose accuracy cannot reasonably be questioned.”

1 was commenced on December 2, 2008, when QLS recorded a Notice of Default (#6 Ex. 2.) The
2 Notice of Default states that payment on the loan was due but not paid on August 1, 2008.²
3 Defendant avers that said notice was mailed to the Plaintiff twelve times, as well as posted and
4 published in a local newspaper. (#6 at 3.) However, because said exhibits are not proper subjects of
5 judicial notice under Fed. R. Evid. 201, the Court does not consider them here.³ Though Plaintiff
6 fails to dispute that said notices were sent, he does argue that Defendants' Motion to Dismiss refers
7 to the subject property as being on "Paradise Place", as opposed to the correct spelling "Paradiso
8 Place", and then states "[m]ail does not get delivered and services cannot be made when addresses
9 are not correct." (#9 at 4.) Plaintiff additionally states that "[t]he fact that Plaintiff only uses his Post
10 Office Box for anticipated and expected communications further negates Defendants' 'attempts' to
11 send written communication to Plaintiff." (Id.) While Plaintiff does not dispute Defendants' claim
12 that notice was also posted and published in the Pahrump Valley Times, the Court does not take
13 judicial notice of Defendants' affidavit of publication at this time. See Fed. R. Civ. P. 12(d).

14 Pursuant to NRS §107.080 however, "if proper notice is not provided . . . the person who
15 holds title of record on the date the notice of default and election to sell is recorded . . . may
16 commence an action pursuant to subsection 5 within 120 days after the date on which the person
17 received actual notice of the sale." N.R.S. § 107.080(6). Here, Plaintiff admits actual notice of the
18 foreclosure sale of the subject property on numerous occasions, including July 6, 2009, when he
19 received the notice to determine occupancy status, (see Compl. at ¶ 2), and on July 6, 2009, when he
20 called and spoke with an employee of QLS. Again, Plaintiff admits actual notice of the sale on July

22 ²Plaintiff's Complaint and pleadings do not indicate that the loan was made current at or prior to the time of
23 foreclosure.

24 ³If matters outside of the pleadings are submitted in conjunction with a motion to dismiss, Rule 12(b) grants
25 courts discretion to either accept and consider, or to disregard such materials. See Isquith v. Middle S. Utils., Inc., 847
26 F.2d 186, 193 n. 3 (5th Cir.1988). A court exercises this discretion by examining whether the submitted material, and the
resulting conversion from the Rule 12(b)(6) to the Rule 56 procedure, may facilitate disposing of the action. Id. at 193 n.
3. If the court elects to convert the motion, "[a]ll parties must be given a reasonable opportunity to present all the
material that is pertinent to the motion." Fed. R. Civ. P. 12(d).

1 7, 2009, when he sent an inquiry letter to QLS via U.S. Certified Mail, (id. at ¶ 5), on July 21, 2009,
2 when he received a response to his written request from QLS, (id. at ¶ 6), on July 23, 2009 when he
3 sent a response letter to QLS, (id. at ¶ 7), when he was served with a Three Day Notice to Quit from
4 FNMA on July 23, 2009, (id. at ¶ 8), and again on August 8, 2009, when he mailed a request for a
5 “qualified written response” to counsel of FNMA, ALS, and QLS, (id. at ¶9), and again on August
6 10, 2009, when he received a response regarding his qualified written request. (Id. at ¶ 12.) Finally,
7 Plaintiff admits actual notice of the sale no later than October 6, 2009, when he appeared at a hearing
8 for unlawful detainer concerning his eviction from the subject property. (Id. at ¶ 17.)

9 Accordingly, pursuant to NRS §107.080, this action had to be brought no later than February
10 3, 2010, 120 days from the Plaintiff’s latest admitted date that there was full knowledge of the sale,
11 to be timely. In fact, it was not brought until April 15, 2010, after the action for eviction had
12 recommenced. Thus, the Court finds that Plaintiff’s claim is not timely, and is time barred pursuant
13 to NRS §107.080.

14 **IV. Conclusion**

15 Accordingly, **IT IS HEREBY ORDERED** that Defendants’ Motion to Dismiss (#6), is
16 **GRANTED**. Judgment to be entered on behalf of Defendants.

17 DATED this 4th day of March 2011.



18
19
20 Kent J. Dawson
United States District Judge